IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-620

JOHN GUYTON

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

****

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OPPOSITION TO JURISDICTION

In the first instance, the Petitioner has failed to successfully raise a constitutional issue. The fact that Petitioner mentions the concepts of due process and equal protection does not create a constitutional question where, in reality, none exists. Furthermore, an inspection of the opinions of the Ohio Courts involved, evidences that no constitutional issue was ever presented or decided. The alleged error before this Court concerns Ohio Procedure and not an issue repugnant to the United States Constitution.

Secondly, the Petitioner is basing his jurisdiction for a Writ of Certiorari on issues concerning Ohio procedure and judicial discretion which are not within the ambit of 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On March 13, 1976, Petitioner was indicted for Carrying a Concealed Weapon in violation of Section 2923.12, of the Ohio Revised Code, and secondly, for Having a Weapon While Under Disability in violation of Section 2923.13(A)(2) of the Ohio Revised Code. On June 3, 1976, Petitioner filed his motion to suppress evidence. The motion was overruled at a hearing in the Summit County Court of Common Pleas on June 22, 1976. The Petitioner then entered a plea of "no contest" to the two counts of the indictment. Subsequently, Petitioner was sentenced 1-10 years for Carrying a Concealed Weapon and 1-5 years for Having a Weapon While Under Disability, to be run concurrently. Said sentence was held in abeyance and the prior bond was continued pending appeal.

On July 22, 1976, timely notice of appeal was filed, and on February 2, 1977, the Court of Appeals, Ninth District of Ohio, affirmed the judgment. On March 4, 1977, timely notice of appeal was filed to the Supreme Court of Ohio. The Supreme Court dismissed Petitioner's appeal on June 30, 1977,

and overruled Petitioner's motion for leave to appeal. It is from the dismissal of this appeal that Petitioner seeks a writ of certiorari.

STATEMENT OF FACTS

The State of Ohio, does not contest the Statement of the Case offered by the Petitioner. The State does, however, disagree with portions of the conclusions offered by the Petitioner in his Statement of Facts. Therefore, the State offers the following supplement to the facts presented in the Petitioner's Brief.

On December 14, 1975, Officer Sparks and Officer Burell were working together on police patrol duty for the City of Akron. During the evening hours of their shift, these officers were dispatched to a west side neighborhood to investigate a "drunk" passed out at the wheel of a car (Transcript, Page 2). Upon investigation, the officers discovered the Appellant passed out at the wheel of his auto. The officers also detected an alcoholic odor coming from the auto (Transcript, Page 35). The vehicle was in the street, on the wrong side of the road, with the headlights on and the engine running (Transcript, Page 3).

In the process of attempting to arouse the Appellant, Officer Sparks observed an empty holster

on the Appellant's belt while the Appellant was still inside his car (Transcript, Page 3, 8, compare however, Pages 9-10). Officer Burell saw something hanging on the Appellant's belt but was unable to identify it as an empty holster (Transcript, Page 79). Officer Burell did testify, however, that the Appellant was fidgeting around between and under the seat (Transcript, Page 78). At this point both officers pulled their guns and removed the Appellant from his auto. An immediate frisk was conducted and the Appellant was in fact wearing an empty holster and also was carrying a loaded .38 caliber revolver in his rear pocket.

The Appellant was subsequently placed under arrest for carrying a concealed weapon and intoxication.

After the motion to suppress, upon a plea of no contest, the trial judge found the Appellant guilty. Since the instant offense was the Appellant's fourth weapons conviction, the Court imposed a penitentiary sentence with a provision for an appeal bond (Transcript, Pages 144-145).

RESPONDENT'S ANSWER TO THE PETITIONER'S REASON FOR GRANTING THE WRIT

THE DECISION BELOW REGARDING THE CONDUCT OF THE RESPONDENT IS CONTRARY TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND RELEVANT DECISIONS OF THIS COURT.

The Fourth Amendment of the United States Constitution does not prohibit all searches. The scope of its protection is based on reasonableness. Only "unreasonable" searches are prohibited. While there can be no argument that warrantless searches are less preferred than searches under a warrant, the former are not entirely prohibited.

There are various warrantless searches which are held "reasonable" due to the attending circumstances. This Court has set forth a two-prong-test for reasonability in Terry v. Ohio, 392 U.S. 1, 28-29 (1968).

> First, the court must determine the presence of circumstances sufficiently exigent to warrant disregard of the Fourth Amendments ban against invasions of privacy. Second and equally important the court must examine with care the manner and scope of the search that was conducted in response to the purportedly "exigent circumstances." United States v Langley, 466 F.2d 27, 34 (6th Cir. 1972)

The State submits that the exception to the warrant requirement which validated the initial intrusion in this case was the "emergency doctrine". In any situation where an individual is in some type of distressed state, a police officer has not only a right but a duty to assist or investigate. Pursuant to this duty, the law officer may make any reasonable intrusion necessary to obtain the information required to offer assistance. Evidence of criminal activity, discovered in the process of helping a distressed individual, is admissible in criminal prosecutions under the "emergency situation doctrine." Wayne v United States, 318 F.2d 205, 212 (D.C. Cir. 1963); United States v Barone, 330 F.2d 543, 545 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964).

The State maintains that under the circumstances the search met the standards of reasonability set forth in Terry, supra. In support of their initial radio information, the officers determined that the Petitioner appeared to be passed out behind the wheel of his automobile. The vehicle was in the street on the wrong side of the road in danger of being struck by on-coming cars. Officers

checked on Petitioner's condition by performing a reasonable and limited intrusion into his car. The State submits that the circumstances were sufficiently exigent to warrant their limited initial intrusion.

While the officers continued to check on the Petitioner's condition by performing a reasonable and limited intrusion, evidence developed that the Petitioner may be armed. The officers by pulling their guns and conducting an immediate "frisk" for weapons, acted in the only logical manner consistent with their safety. Probable cause to arrest or search clearly does not control the fact pattern in issue. While the officers may have had probable cause to arrest (intoxication), their conduct forming the foundation for a "frisk" is only required to be based on probable cause to investigate. As outlined in Terry, supra, this standard is less than probable cause to arrest and is conducted for the officers safety. See also, Adams v Williams, 407 U.S. 143 (1972).

Although, the officers may not have feared Petitioner, the facts indicated that he may be armed and dangerous.

Pursuant to the argument offered, the State respectfully submits that the police conduct in the instant case comports within the constitutional mandates.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the Argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do certify, pursuant to Supreme Court Rule 33(3)(b), that three copies of Respondent's Answer to Petitioner's Writ for Certiorari was mailed, first class postage prepaid, to RALPH B. MAHER, Attorney at Law, 630 Centran Building, Akron, Ohio 44308.

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